

**CALIFORNIA COUNCIL FOR ENVIRONMENTAL
AND ECONOMIC BALANCE
100 Spear Street, Suite 805, San Francisco, CA 94105**

Via Electronic Mail

November 26, 2004

Mr. Tim Hall
California Integrated Waste
Management Board
1001 I Street
Sacramento, CA 95814
timothyh@ciwmb.ca.gov

Mr. Dmitri Smith
California Integrated
Waste Management Board
1001 I Street
Sacramento, CA 95814
dsmith@ciwmb.ca.gov

**Re: Cal/EPA EJ Action Plan Implementation: CCEEB's Preliminary
Comments regarding the Definition of "Precautionary Approaches"
or "Precautionary Approach"**

Dear Mr. Hall and Mr. Smith:

The California Council for Environmental and Economic Balance ("CCEEB") is a coalition of business, labor and public leaders that strives to advance collaborative strategies that protect public health and the environment while allowing California's economy to grow. Following are CCEEB's comments regarding the definition of "precautionary approaches" or "precautionary approach" under Cal/EPA's Environmental Justice Action Plan (the "EJ Action Plan"). We have organized the comments into the following four areas.

- 1) introductory comments;
- 2) a suggested definition;
- 3) preliminary suggestions for guidelines or principles for application of the definition; and
- 4) closing comments.

I. INTRODUCTORY COMMENTS

Comment 1: Environmental justice programs should use clearly defined terms.

CCEEB supports Cal/EPA's effort to define "precautionary approaches" or "precautionary approach" under the Action Plan. CCEEB believes that environmental justice programs should clearly define terms. Clear terms allow Cal/EPA and stakeholders from various sectors of the public (including communities and businesses) to have to the same understanding of Agency policies.

Comment 2: The EJ Action Plan's sections on precautionary approaches are based on a recognition that Cal/EPA and the BDOs already use a precautionary approach in many of their programs.

Under Cal/EPA's EJ Action Plan, Cal/EPA Boards, Departments and the Office of Environmental Health Hazard Assessment ("OEHHA") will:

- A) "develop a working definition of "precautionary approaches" (Phase 1);
- B) "inventory where/how precautionary approaches **are used** in Cal/EPA's environmental programs, and any obstacles to limit precautionary actions" (Phase 2);
- C) "evaluate whether **additional** precaution may be warranted in Cal/EPA's environmental justice programs to address or prevent environmental justice problems" (Phase 3);
- D) "identify reasonable, cost-effective approaches that could be used to prevent or minimize adverse environmental impacts" (Phase 3); and
- E) "develop guidance on precautionary approaches and recommend implementation options, including proposals for policy regulatory and statutory changes" (Phase 5). [Emphasis added.]

In drafting this language, Cal/EPA recognized that the BDOs already use a precautionary approach in many of their programs.

In the Advisory Committee's process in 2002 and 2003, the Committee had heard many concerns about the "precautionary principle" (e.g., the Wingspread Statement) from many participants in the process. As an alternative to the precautionary principle, CCEEB noted in the Committee's process that Cal/EPA already uses a precautionary approach. Based on a written suggestion from CCEEB that Cindy Tuck shared with the Advisory Committee on March 18, 2003, the Advisory Committee (at Page 21 of the Committee's report) recommended that the BDOs:

“Identify, for each BDO, significant decision points or processes within existing and developing programs where a **precautionary approach is currently used** or could be use, and evaluate whether additional precaution is needed to address or prevent environmental justice problems.” [Emphasis added.]

Cal/EPA based key parts of the Action Plan language quoted above on this language from the Advisory Committee. From the Committee’s language, it is evident that the Advisory Committee recognized that the BDOs currently use a precautionary approach in many of their programs.

The process that Cal/EPA and the California Integrated Waste Management Board (the “CIWMB”) are going through now will help to capture the precautionary approach more formally (i.e., in a written definition and in guidance). The steps under the EJ Action Plan will allow Cal/EPA to become more transparent in the process that the Agency goes through in making decisions (such as in rulemakings) and to identify where additional precaution is needed and to address those gaps with reasonable, cost-effective approaches.

II. SUGGESTED DEFINITION

Comment 3: CCEEB suggests that Cal/EPA define “precautionary approach” as:

“Precautionary approach” means the application of judicious and responsible decision making based on best available science and on the weighing of the level of scientific uncertainty and the potential risk of damage. A precautionary approach is based on the recognition that the absence of full scientific certainty shall not be used as a reason for postponing decisions where there is a risk of serious or irreversible harm.

This statement is based on language from the document that Cal/EPA has referenced in the recent workshops from the U.S. Commission on Ocean Policy and the Canadian document entitled A Framework for the Application of Precaution in Science-Based Decision Making About Risk. While CCEEB has concerns about some parts of the latter document, many parts of the document include constructive thoughts in this area.

We believe that this suggested definition captures the precautionary approach that Cal/EPA uses in its science-based decision-making.

III. PARTIAL LIST OF GUIDELINES OR PRINCIPLES FOR APPLICATION

Comment 4: Several entities have made statements on (or “definitions” of) the use of precaution. What becomes critical for ensuring that implementation is reasonable and not extreme is not just the definition but additionally what are the guidelines or guiding principles for implementation.

The definition that Cal/EPA develops will be an important one, but guidelines or guiding principles will be needed to ensure that implementation of the Action Plan is reasonable. CCEEB recognizes that Cal/EPA is developing the definition at this time and plans to develop guidelines in Phase 5 of EJ Action Plan Implementation. However, we thought it would be constructive to include in this comment set some initial suggestions regarding guidelines.

Following is a preliminary and partial list of suggested guidelines or principles for application. These guidelines are consistent with our understanding of how the BDOSs currently exercise precaution in their programs.

- A. The criteria for triggering the precautionary approach should be clear. For example, mere speculation about potential harm should **not** trigger review under the precautionary approach.
- B. Once review under the precautionary approach is triggered, the first level of decision is whether Agency action is needed.
- C. If action is needed, the appropriate action will depend on the level of scientific uncertainty about the risk and the potential risk of damage. The action should be targeted at the sources of the risk in an equitable fashion.
- D. If agency action is needed, the appropriate action can be selected from a range of actions depending on the level of scientific uncertainty and the potential risk of damage. Such actions may include: 1) information and guidance; 2) public awareness/involvement/education campaigns, 3) research, monitoring or further data collection; 4) incentive programs; 5) command and control regulations; and 6) risk reduction programs including the selection of pollution prevention practices by businesses, etc.

- E. The process should be transparent.
- F. The precautionary approach should take into account the **benefits** of the activity or project in determining what is the appropriate action (i.e., in making the risk management decision).
- G. Required measures should be effective, reasonable, feasible, cost effective and equitable.
- H. The process should recognize that it is impossible to prove a negative.
- I. Fair and consistent application is important.
- J. Environmental program decisions have impacts beyond environmental protection. While protecting public health and the environment, Cal/EPA needs to avoid decisions that harm business climate and the retention and creation of jobs. (A strong economy and the jobs that go with it are good for public health.)

IV. CLOSING COMMENTS

Cal/EPA's existing programs have been very successful in improving environmental protection. Cal/EPA should not move away from the current effective path of focusing on scenarios where environmental problems are well documented. Additionally, as the BDOs identify where there are gaps in the area of precaution and take steps to address those gaps, it is critical that the Agency and BDOs be cognizant of the benefits of the product or action and the impacts on business climate and job creation and retention.

We note that CCEEB's Alternative Opinion at Section VIII of the Advisory Committee's report includes an explanation of CCEEB's concerns regarding some issues that may arise in the discussion regarding precaution (e.g., the precautionary principle, and mandated chemical/product or process substitution based on alternatives assessments).

CCEEB appreciates consideration of these comments by Cal/EPA and CIWMB Staff. CCEEB recognizes that this is a challenging area of work. We look forward to continued discussions with Cal/EPA, CIWMB Staff and other stakeholders.

Page 6

If you have any questions, or if you would like to discuss the comments, please contact me at (415) 512-7890 or Cindy Tuck at (916) 442-4249.

Sincerely,

VICTOR WEISSER
President

VIA ELECTRONIC MAIL

cc: The Honorable Terry Tamminen
The Honorable James Branham
Ms. Tam Doduc
Mr. Jackson Gualco
Mr. Robert Lucas
Ms. Cindy Tuck